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In the
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1958.

No. .....

NORTON R. GANGER and L. C. BETHART ET AL.,
Appellants,

vs.

CITY OF MIAMI, a Municipal Corporation in Dade County, Existing under the Law of the State of Florida,
Appellees.

THOMAS B. HAMILTON and JANE Q. HAMILTON, His Wife, and HUNTER LYONS, INC.,
a Florida Corporation,
Appellants,

vs.

CITY OF MIAMI, a Municipal Corporation in Dade County, Existing under the Law of the State of Florida,
Appellees.

APPEAL FROM THE SUPREME COURT OF THE STATE OF FLORIDA.

STATEMENT AS TO JURISDICTION.

In compliance with Rule 15 of the Revised Rules of the Supreme Court of the United States, appellant submits herewith its statement as to the basis upon which the Supreme Court has jurisdiction on appeal to review the judgment of the Supreme Court of the State of Florida entered in these causes.

OPINIONS BELOW.

The opinions of the Supreme Court in this cause are reported in 101 So. 2d 116 and 123.* Copies of these opinions are attached hereto as Appendix "A".

JURISDICTION.

Appellants' suit sought to have certain assessments levied pursuant to sections of the statutory charter of the City of Miami declared unconstitutional and void. The suits were originally commenced in the Circuit Court of the Eleventh Judicial Circuit of Dade County, in which County the properties lie and the City of Miami is situated. The decision of the Circuit Court held the assessments to be void on constitutional grounds. The decision of the Supreme Court of Florida first affirmed the decree of the Circuit Court. On re-hearing granted a majority of the Supreme Court of Florida (three Judges dissenting) reversed the decree. A petition for rehearing timely filed by the appellants herein was denied on April 2, 1958. A notice of appeal to the Supreme Court of the United States was presented to the Supreme Court of Florida on June 2, 1958.

The jurisdiction of the Supreme Court to review the decision by direct appeal is conferred by Title 28, United States Code, Section 1257 (2). The following cases sustain the jurisdiction of the Supreme Court to review the judgment on direct appeal in this case:

Mullane v. *Central Hanover Bank & Trust Company*, 339 U.S. 306.

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*This volume does not contain the original opinion. See R. 32.

New York v. *New York, N. H. & H. R. Co.*, 344 U.S. 293.
Covey v. *Town of Somers*, 351 U.S. 141.
Wisconsin Electric Power Company v. *City of Milwaukee*, 352 U.S. 948.

STATUTES INVOLVED.

City of Miami Charter, Section 56 (a) (Class 1) (E) (F) (L) (M) (N) (O), Chapter 10847, *Laws of Florida 1925 as amended.* These charter provisions are set forth in Appendix "B" attached hereto.

QUESTIONS PRESENTED.

1. Is notice of hearing on special assessments as to resident owners whose interest, names and addresses were known by, in the possession of, and readily available to the City imposing the assessments, sufficient to comply with the requirements of the due process clause of Article XIV, Section 1, Amendments to the Constitution of the United States, where it affirmatively appeared that the notice was published only two times in the classified section of a large metropolitan newspaper, that no other or further notice was given to or served on the abutting owners, and where the trial court affirmatively found that the alleged improvement conferred no benefit upon the abutting property?

2. Where a state statute requires abutting property owners of a particular municipality to file suit in the Circuit Court of Dade County within ten (10) days of confirmation of the special assessment roll, and the resident property owners had no notice of any of the proceedings other than by notice of a hearing of objections to the roll

published in the classified section of a local metropolitan newspaper, is such a limitation upon the right of abutting property owners to resort to the court violative of the due process and equal protection clauses of the Federal Constitution?

STATEMENT.

Pursuant to the provisions of an Act of the Florida Legislature (Ch. 10847, Laws 1925) incorporating the City of Miami, the city commission decided to resurface certain arterial highways serving the business district in the city. The Charter Act which authorized the doing of such work provided for the laying of special assessments against the property found to have been specially benefited. This legislative enactment provided for two notices to be given to affected property owners—one upon the initiating of the proceedings and the other upon the conclusion. Both notices were *required* to be published in a daily newspaper of general circulation published in the City. No other provision for notice was contained in the Act.

The first notice was required to be published *one time* and to state that at a meeting of the Commission held on a certain day and hour, it would hear the objections of all interested persons to the confirmation of the resolution which ordered the improvements to be made.

The second notice was required to be published *two times* and to state that at a regular meeting of the Commission held on a certain day and hour, all interested might appear and file written objections to the confirmation of the special assessment roll which fixed the amount of the liens which the Commission had imposed on each abutting property as its share of the cost of the improvement.

In one of the cases at bar (*Hamilton* v. *City of Miami*) the cost assessed against the abutting property was $173,148.00. In the Ganger case, the cost so assessed was $56,525.00.

The Charter Act further provided that upon the confirmation of the roll it would be final and conclusive, unless, within ten (10) days from such confirmation, an affected owner filed a verified petition in the Circuit Court of Dade County, setting forth that the assessment was invalid. In addition he was required to file with the Clerk a written undertaking in the sum of $200.00 with sufficient surety conditioned to pay all costs and damages sustained by the City by reason of the proceedings.

Upon service of the petition on the City Manager within ten (10) days and the filing of his answer, the cause was required to be heard "upon such evidence as may be presented to the Court."

On hearing the Court was authorized to set aside the assessment in whole or in part.

On March 1, 1950, the Miami City Commission adopted a resolution ordering a local improvement to be made in certain downtown streets by *resurfacing* the existing asphalt concrete pavement with a specified leveler course and wearing surface. Pursuant to the Charter, a notice of local improvement was published one time in the classified advertising section of the Miami Herald.* The body of the notice was as follows:

"All interested will take notice that at a meeting of the City Commission at 9:30 o'clock AM March 15,

---

*This paper is said to carry more advertising in its classified section than any other newspaper in the United States.

1950, their objections will be heard to the confirmation of Resolution No. 22277, adopted March 1st, 1950, ordering paving improvements on the following avenues, to-wit:

* * *

"Plans, specifications and estimate of cost of said improvement are on file in the City Clerk's Office.

F. L. Correll,
City Clerk."

It will be noted at once that the notice contains several glaring defects: It is indefinite as to the place where the objections would be heard, is addressed to no one in particular and does not designate the municipality which is involved in the work and gives no information as to the fact that special assessments were to be levied to pay for the improvement.

Subsequently a resolution was adopted confirming the initiating resolution and ordering the work to be done which was duly accomplished.

At the time of the adoption of Resolution 22277, and at the present time, the streets described in Highway Improvement District H-477 were main thoroughfares of the City of Miami. These streets had originally been paved, at the expense of the abutting property owners, and the paving had been laid with a sufficiently suitable and durable surface to enable all abutting property owners to obtain ingress and egress to and from their several properties and to afford reasonable use by the general public. The streets in said highway improvement district were not reasonably in need of being resurfaced, and it was not necessary to do the work thereon which the City subsequently performed and for which it thereafter imposed special assessment liens on the abutting properties (R. 4).

When the work was completed in February, 1953, the City took steps to impose the cost thereof on the abutting owners and in order to comply with the Charter caused a notice to be published two times in the Miami Daily News in the issues of February 20 and 27, 1953, the body of which reads as follows:

> "All interested will take notice that at a meeting of the City Commission at 9:30 o'clock AM March 15, 1950, their objections will be heard to the confirmation of Resolution No. 22277, adopted March 1st, 1950, ordering paving improvements on the following avenues, to-wit:
>
> (Describing property.)
>
> in District H-477.
>
> Said Preliminary Assessment Roll is now open to public inspection in the City Clerk's Office.
>
> F. L. Correll,
> City Clerk."

There being no objection made, the Commission resolved that the Assessment Roll be confirmed and that the abutting property received benefits in proportion to the cost. Appellants did not become aware of the assessment until the time for appeal had expired.

Within a few weeks thereafter (May 4, 1955) Hamilton and others suing on behalf of themselves and all others similarly situated* brought a suit in the Circuit Court of Dade County to enjoin the enforcement of the liens and to cancel the assessments (R. 1).

The Complaint charged that the assessments were void because no benefit was derived from the improvement and

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*Such practice has been expressly approved by the Supreme Court of Florida. *Tenney et al.* v. *City of Miami Beach*, Fla., 11 So. 2d 188.

because the notice was insufficient.

The Complaint expressly charged that the liens sought to be imposed were void in that they constituted a taking in violation of the Constitution of the United States.

The Circuit Court of the Dade County is a court of general jurisdiction (*Fla. Const.*, Art. V, Sec. 11). It has constitutional and statutory power over cases involving the legality of any tax, assessment or toll. *Fla. Sts.* 196.01. There is no specific statute of limitations governing the bringing of such a suit. Actions for the recovery of money may only be commenced within three years from the accrual of the causes of action, *Fla. Sts.* 95.11, and actions against a municipality to recover damages for negligent injury to persons or damage to property must be brought within twelve months from the time of the injury or damage. *Fla. Sts.* 95.24.

The Circuit Court held the complaint, as amended to be sufficient and denied the City's motion to dismiss. The Supreme Court of Florida affirmed this order (*City of Miami* v. *Hamilton*, Fla., 73 So. 2d 715).

The City answered the complaint, as amended, alleging that the plaintiffs were estopped to attack the assessments and that the confirming resolution was conclusive on the parties.

On a trial before the Court (Wiseheart, J.) it was found that:

> "5. The notice of hearing of objections to the imposition of the assessment hereinabove referred to was insufficient as a matter of law in that it specified no place where the objections would be heard, and there was no designation in the notice of what city commission was to hear objections, no designation of the City

in which the streets were located, or of what city the person filing the notice was clerk. The notice was also insufficient because it was inserted in the classified section of the Miami Herald and in such a manner that it cannot be said that any reasonable person was put upon notice by it that their property was going to be subjected to a special assessment.

"6. The streets which comprise Highway improvement District No. H-477 are thoroughfares and arterial highways, with but one exception, in the City of Miami, and the resurfacing was necessary to keep the streets in repair to facilitate the flow of traffic on such streets in and out of the downtown Miami area.

"7. No special benefit was conferred upon the abutting property by the resurfacing of said streets, and the benefit which was derived therefrom was general and not special." (R. 20).

It was accordingly decreed that the action of the City in assessing the cost of the improvements against the abutting owner was unreasonable and null and void.

From this decree the City appealed.

Shortly after the institution of the Hamilton suit, certain property owners, including one Ganger brought a similar suit attacking similar assessments in another district. This suit was consolidated with Hamilton's suit for the purpose of trial and a like decree was rendered (R. 26). The City also appealed Ganger's suit.

The Supreme Court of Florida affirmed both decrees, but the opinion was delivered in Ganger's suit and a simple memorandum opinion was filed in Hamilton's suit (R. 32. 43).

The majority opinion (per Thomas, J.) held that the notice was sufficient, but that the City lacked statutory power to resurface the streets at the cost of the abutting

owners. Justice Thornal concurred specially, saying (R. 38):

> "I concur in the judgment of affirmance. I agree with all of the opinion of Mr. Justice Thomas save that portion which in effect holds that the City Charter did not authorize the levy of an assessment for special benefits to particular property which might result from the 're-surfacing' of a street. In my view, authority to assess the cost of 're-macadamizing' a street is tantamount to authority to assess for 're-surfacing' a street. However, in order to justify the assessment the improvement must redound to the special benefit of the property that is being assessed. Utley v. City of St. Petersburg, 107 Fla. 6, 144 So. 58; Fisher v. Board of County Commissioners of Dade County, (Fla. 1956), 84 So. 2d 572.
>
> "Here the trial judge specifically found that 'the work was for the benefit of the general public, and the abutting owners received no special benefit'. The record abounds in evidence more than adequate to sustain this conclusion.
>
> "For the foregoing reasons and the reasons announced by Mr. Justice Thomas on the other points, I would affirm this decree."

Drew, O'Connell and Hobson, JJ., dissented.

On the City's petition for re-hearing, Thornal, J., in spite of what he had said, joined the minority and voted to reverse the decree. Thomas, Terrell and Roberts, JJ., dissented.

The property owners petitioned for re-hearing on the following grounds among others (R. 66):

> "4. In holding the notice of the confirmation of the assessment roll sufficient, and that the appellees were estopped to challenge the lack of benefits because they failed to object pursuant to the notice, the Court

overlooked, or failed to consider that the procedure for the imposition of assessment liens is quasi judicial and that the requirements of procedural due process guaranteed by Amd. XIV, U.S. Const., must be complied with. In the case of residents, constructive notice, as attempted, is violative of the rights secured by such amendment."

Walker v. *City of Hutchinson*, 352 U.S. 112.
Mullane v. *Central Hanover Bank & Trust Co.*, 339 U.S. 306.

"5. The Court, in holding the notice good, overlooked or failed to consider that the notice directed to all interested persons did not contain any notice or warning (even by inference) that a special assessment was going to be levied.

* * *

"8. In holding the notice sufficient, the Court overlooked or failed to consider the fact that the City Charter and requirements of due process required that the notice state the time and place where the objectors will be heard. This the notice wholly failed to do.

"9. The Court overlooked or failed to consider that the Chancellor made a finding after a full hearing that the assessed property owners received no benefit. Such a finding renders the assessment void, discriminatory and unconstitutional under the equal protection and due process clauses of the Federal Constitution.

"10. The Court overlooked or failed to consider that a special assessment is void unless founded upon special benefit to the abutting owners."

Village of Norwood v. *Baker*, 172 U.S. 269.

While the proceedings were pending in the Supreme Court of Florida, the objecting taxpayers learned that the City had created at least two new highway improvement districts, in which public improvements were to be made.

The work done in those districts is almost identical with that done in the districts involved in the present litigation. Based upon this discovery the property owners took the deposition of the Finance Director of the City of Miami and procured from him the admission that the work in the new districts was to be paid for from the proceeds of bonds issued by the City to the payment of which there was pledged the moneys derived from a franchise given to the Florida Power & Light Company, the local public utility.

Municipal action with respect to the assessments was evidenced by a Resolution (R. 64) which provided for the making of a local improvement in a specified district and which contained a recital by one of the Commissioners that the Commission "had agreed not to assess property owners for a proportionate share of the costs of any resurfacing of streets." Accordingly he "requested that any reference to assessments for the costs of this improvement be stricken from the Resolution, which was agreed to prior to roll call on the Resolution."

The property owners also proved by a memorandum from the City Finance Director to the Department of Engineering that the resurfacing work in these districts was not to be assessed against the abutting owners, but that the method of removing the liens was not to be agreed upon at that time, because pending law suits (evidently meaning the ones in this case) made such action inadvisable. The memorandum directly referred to "litigation of other districts of a similar nature". It concluded by stating that as soon as a clearance was received from the Law Department, arrangements would be made to have the liens removed by commission action (R. 62).

Upon the determination of this matter, the property owners then sought to bring these proceedings to the at-

tention of the Supreme Court by filing a petition for leave to supplement the record (61).

This petition was denied, but in the petition for rehearing heretofore referred to, a reconsideration of the cause was sought upon the grounds that the Court overlooked or failed to consider this petition, which showed that since the work complained of in the case at bar was completed, the City had on other occasions done similar work in similar districts for which it made no charge to the abutting owners. It was expressly contended that this action, done under a City ordinance, constituted class legislation and denied to the property owners here the equal protection of the laws contrary to the Fourteenth Amendment of the Constitution of the United States.

The Court then granted the property owners (appellants herein) leave to file a brief directed to the Federal Constitutional Questions presented by the petition for rehearing but later, the Court, without assigning any reason for such action, struck the brief.

On the same day on which the brief was struck, April 2, 1958, the Court denied the property owners' petition for re-hearing. This appeal is taken from the opinion on rehearing which did not become final until April 2, 1958.

THE QUESTION IS SUBSTANTIAL.

The question involved on this appeal is similar to that raised in *Mullane* v. *Central Hanover Bank & Trust Company*, 339 U.S. 306, and *New York* v. *New York, N. H. & H. R. Co.*, 344 U.S. 293, relating to the insufficiency of notice by publication and is of importance to all property owners. In those cases the Court held that notice by publication can now only be justified where necessary. In

Mullane v. *Central Hanover Bank & Trust Company*, 339 U.S. 306, the late Mr. Justice Jackson stated this for the Court as follows (p. 318):

> "* * * Where the name and post-office addresses of those affected by a proceeding are at hand, *the reasons disappear* for resort to means less likely than the the mails to apprise them of its pendency." (Emphasis supplied).

In *New York* v. *New York, N. H. & H. R. Co.*, 344 U.S. 293, the Court in a unanimous decision said (pp. 296, 297):

> "Section 77 (c) (8) of the Act states that 'The **Judge shall cause reasonable** notice of the period in which claims may be filed, * * * by publication or otherwise'. 11 U.S.C., Sec. 205 (c) (8). We hold that publication of the bar order in newspapers cannot be considered 'reasonable notice' to New York under the circumstances of this case.
>
> "Notice by publication is a poor and sometimes a hopeless substitute for actual service of notice. Its justification is difficult at best. See Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 94 L. Ed. 865, 70 S. Ct. 652. But when the names, interests and addresses of person are unknown, plain necessity may cause a resort to publication. See, e. g. Standard Oil Co. v. New Jersey, 341 U.S. 428, 95 L. Ed. 1078, 71 S. Ct. 822. The case here is different. No such excuse existed to justify subjecting New York's claims to the hazard of forfeiture arising from the 'constructive notice' by newpaper. * * *
>
> "The statutory command for notice embodies a basic principle of justice * * * that a reasonable opportunity to be heard must precede judicial denial of a party's claimed rights. New York City has not been accorded that kind of notice."

In the New York case the City imposed liens on specific parcels of the railroad's real estate for street, sewer and other improvements. Reorganization of the railroad was begun in the Federal District Court. That court issued an order directing creditors to file their claims by a prescribed date. Copies of that order were mailed to creditors who had appeared in court. Other creditors had to depend for their notice on two once-a-week publications of the order in five daily newspapers, one of which was the Wall Street Journal. New York City received no copy of the order and never filed its lien claims. The railroad then sued to have the city's lien claims declared unenforceable. The District Court and Court of Appeals held for the railroad. However on appeal to the Supreme Court of the United States that holding was reversed.

More recently this court noted probable jurisdiction of a case involving the identical question here presented (*Wisconsin Electric Power Company* v. *City of Milwaukee*, 352 U.S. 948). In this case the Wisconsin Electric Power Company brought suit in the circuit court for Milwaukee County attacking special assessments imposed upon property of the plaintiff by the City, on the ground that the property owner did not have sufficient notice of imposition of the assessments. The Circuit Court dismissed the suit and the Power Company appealed. The decree was affirmed by a divided court. Upon remand the plaintiff obtained leave to file an amended pleading which was done and the cause was again dismissed. The Power Company again appealed and on the second appeal the appellant relied upon *New York* v. *New York, N. H. & H. R. Co., supra,* and *Mullane* v. *Central Hanover Bank & Trust Co., supra.* The Court again affirmed the decree and the Power Company appealed. This court noted probable jurisdiction (352 U.S. 949) and remanded the case to the Supreme Court of

Wisconsin for further consideration of the Federal question. On reconsideration the Supreme Court of Wisconsin said, 274 Wis. 121, 81 N.W. 2d 298:

> "In view of the determination made by the United States Supreme Court we hold that the constructive notice given by the defendant city by publication of the proposed special assessments against the plaintiff's lands did not meet the requirements of due process. Mullane v. Central Hanover B. & T. Co., 1950, 339 U.S. 306, 70 S. Ct. 652, 94 L. Ed. 865, and Walker v. City of Hutchinson, 1956, 352 U.S. 112, 77 S. Ct. 200, 1 L. Ed. 2d 178. Therefore, it was error for the trial court to have sustained the general demurrer interposed to plaintiff's amended complaint."

No necessity exists which justifies notice by publication in the instant case. The City had the names and addresses of the property owners and actually mailed bills to them for the special assessment lien after the roll had been confirmed.

Necessity is not proven by the fact that the legislature has sanctioned notice by publication of special assessments. The same argument was rejected by this Court in *Mullane* v. *Central Hanover Bank & Trust Company*, 339 U.S. 306. It is for the courts to determine whether an act is constitutional and not for the legislature.

Such indeed has been the holding of the Supreme Court of Florida. In *Rafkin* v. *City of Miami Beach*, Fla., 38 So. 2d 836, an attack was made upon special assessments proceedings conducted by the City of Miami Beach under a charter which is almost identical with that of the City of Miami. It was contended among other things that the notice of special assessment proceedings was insufficient because it was published in the classified advertising section of the Miami Herald, the same paper publication in which is in-

volved in the instant suit. In discussing this point the court said:

> "* * * The notice in question did not meet the requirements contemplated by law, * * * it is so intermingled with other printed matter that one of ordinary mind would not be put on notice that his rights were in danger."

This opinion was written for the Court by Justice Terrell, now the Chief Justice, who originally concurred in the Court's opinion affirming the decree of the Circuit Court in this case and who subsequently voted in favor of denying the City's petition for re-hearing, which was subsequently granted, and upon which action the decree of the Circuit Court was reversed. When the Appellants herein moved for a re-hearing on the ground that the action of the City violated the property owners' constitutional rights, Chief Justice Terrell voted against granting this petition for re-hearing. However, Justice Hobson who had previously voted to reverse the decree of the Circuit Court of Dade County, changed his position and voted to grant the property owners' petition for re-hearing based on Federal Constitutional grounds, but the defection of the Chief Justice left the property owners with a minority on the Supreme Court of Florida.

The situation with respect to that Court is rendered the more puzzling in view of the fact that Justice Thornal originally wrote a specially concurring opinion in which he held that no benefit was conferred upon the abutting property by the re-surfacing work. Justice Thornal subsequently, on the City's petition for re-hearing, voted to reverse the decree but did not state his reasons.*

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*In any case five of the seven Justices of the Florida Supreme Court have at one time or another agreed with the property owners' contention.

The late Mr. Justice Jackson in *Mullane* v. *Central Hanover Bank & Trust Company, supra,* in speaking for the Court said:

> "But when notice is a person's due, process which is a mere gesture is not due process. The means employed must be such as one desirous of actually informing the absentee might reasonably adopt to accomplish it. The reasonableness and hence the constitutional validity of any chosen method may be defended on the ground that it is in itself reasonably certain to inform those affected, compare Hess v. Pawloski, 274 U.S. 352; 71 L. Ed. 1091, 47 S. Ct. 632, with Wuchter v. Pizzutti, 276 U.S. 13, 72 L. Ed. 446, 48 S. Ct. 259, 57 A.L.R. 1230, or, where conditions do not reasonably permit such notice, that the form chosen is not substantially less likely to bring home notice than other of the feasible and customary substitutes.
>
> "It would be idle to pretend that publication alone as prescribed here, is a reliable means of acquainting interested parties of the fact that their rights are before the courts. It is not an accident that the greater number of cases reaching this Court on the question of adequacy of notice have been concerned with actions founded on process constructively served through local newspapers. Chance alone brings to the attention of even a local resident an advertisement in small type inserted on the back pages of a newspaper, and if he makes his home outside the area of the newspaper's normal circulation the odds that the information will never reach him are large indeed. The chance of actual notice is further reduced when as here the notice required does not even name those whose attention it is supposed to attract, and does not inform acquaintances who might call it to attention. In weighing its sufficiency on the basis of equivalence with actual notice we are unable to regard this as more than a feint.
>
> * * *

> "We hold that the notice of judicial settlement of accounts required by the New York Banking Law, § 100-c (12), is incompatible with the requirements of the Fourteenth Amendment as a basis for adjudication depriving known persons whose whereabouts are also known of substantial property rights. Accordingly the judgment is reversed and the cause remanded for further proceedings not inconsistent with this opinion."

The holding is particularly important when it is considered that special assessment proceedings in order to be constitutional must rest upon benefits actually conferred upon the property.

> *McQuillin Municipal Corporations, Third Edition*, Sec. 38.02.
>
> *Illinois Central Railroad Company* v. *City of Decatur*, 147 U.S. 190.

In *Georgia Railway & Electric Company* v. *City of Decatur*, 295 U.S. 165, the Court said:

> "Under the statute and ordinance thus construed, if the burden imposed is without any compensating advantage (as appellants offered to show), the arbitrary abuse of the power exercised is plain, Myles Salt Co. v. Iberia & St. M. Drainage Dist., 239 U.S. 478, 485, 60 L. Ed. 392, 396, 36 S. Ct. 204, L.R.A. 1918E, 190; the assessment amounts to confiscation, Bush v. Branson, (C.C.A. 8) 248 Fed. 377, 380, 381. And this doctrine has been fully recognized in Georgia. Savannah v. Knight, 172 Ga. 371, 375, 157 S.E. 309, 73 A.L.R. 1289."

In such a situation scrutiny should be directed to proceedings where as here, the period of time within which the property owner has to protect his rights is so very short. In such a case not only should the notice be delivered personally, but it should be sufficiently full and complete to inform the property owner that his rights are to be affected. In the case at bar the notice simply states that at a meeting

of the City Commission at 9:30 o'clock A.M., on March 4, 1953, their objections are to be heard, etc. No city was identified, no place specified, no tribunal otherwise designated although there are twenty-six municipalities in Dade County. The notice was simply signed by F. L. Correll, City Clerk.

That notice is necessary, is beyond question.

Turpin v. *Lemon*, 187 U.S. 51.
Londoner v. *City and County of Denver*, 210 U.S. 373.

In *Billingham Bay & B. C. R. Co.* v. *City of New Whatcom*, 172 U.S. 314, involving special assessments, the Court said:

> "* * * And the time and place must be such that with reasonable effort he will be enabled to attend and present his objections."

From *City of Norfolk* v. *Young*, 97 Va. 728, 34 S.E. 886, we quote:

> "The notice * * * wholly failed to designate * * * a place where * * * the party to be affected had the right to appear to expose any alleged wrong in the assessment imposed upon him or his property."

and in *City of Logansport* v. *Polland*, 50 Ind. 151, it is said:

> "* * * the notice given * * * did not specify the place of the meeting of the commissioners and it was, therefore, in our opinion, insufficient. * * * These objections are fatal."

Even if the notice had been sufficient as to form and had been personally served on each complaining property owner, the assessment would still have been void under Federal Constitutional guaranties because a resulting benefit did not flow to the affected properties.

Village of Norwood v. *Baker*, 172 U.S. 269.

In *Milwaukee Electric Ry. & Light Co.* v. *Village of Shorewood*, (Wis.) 193 N.W. 94, the Court held (Headnote 5, 6):

> "An action to avoid a special assessment made under St. 1915, § 905, not brought within the time prescribed by section 924-197, *held* nevertheless maintainable, since the assessment was invalid because not based on benefits.
>
> "The one-year limitation contained in St. 1917, § 121-h, against the bringing of actions to avoid special assessments or taxes, is no bar to an action to set aside an assessment by a village board under section 905, which is void, because not based on benefits."

The trial court found that there had been no resulting benefits to the abutting property in the cases at bar. This finding was not seriously challenged by the City on appeal. Nevertheless, Thornal, J., specially concurring, found that "the record abounds in evidence *more than adequate* to sustain this conclusion". (Emphasis supplied).

The majority opinion below sustained the assessment on the ground that a failure to object *and* resort to the statutory review proceedings worked an estoppel.

Ignoring the oft repeated and familiar rule that an estoppel will not arise out of a void act (*Harvey* v. *City of St. Petersburg*, 138 Fla. 597, 189 So. 861; *Milwaukee Electric Ry. & Light Co.* v. *Village of Shorewood, supra*), the Court also overlooked two equally obvious Federal Constitutional principles, viz.: that an administrative finding not supported by evidence is a nullity and that a failure to resort to judicial review of such a finding will not constitute a waiver unless procedural due process is afforded.

In the case at bar the administrative determination of liability simply recited that:

> "Whereas, no objections thereto were made by any person interested in, or affected by said assessment roll and the said assessment roll appearing, in all respects, regular and in accordance with the requirements and provisions of the City Charter;"

Such an unsupported declaration constitutes a denial of procedural due process since it is obviously arbitrary and capricious.

> *Gallegos* v. *Nebraska,* 342 U.S. 55.
> Cf. *Frankfurter, J., in Schware* v. *Board of Bar Examiners,* 353 U.S. 232.

In *Morgan* v. *U. S.,* 298 U.S. 468, the Court in speaking of the effect of administrative findings held:

> "* * * For the weight ascribed by the law to the finding * * * their conclusiveness when made within the sphere of the authority conferred * * * rests upon the assumption that the officer who makes the findings has addressed himself to the evidence, and upon that evidence has conscientiously reached the conclusion which he deems it to justify. That duty cannot be performed by one who has not considered evidence or argument. It is not an impersonal obligation. It is a duty akin to that of a judge. The one who decides must hear."

The Florida Supreme Court is in accord with this. In *Fisher* v. *Board of County Commissioners of Dade County,* Fla., 84 So. 2d 572, the court said:

> "A 'special benefit assessment' must be levied according to the particular benefits received by the real property in question and in order to sustain the assessment, there must be some proof of the benefits other than the dictum of the governing agency."

The failure to pursue the statutory charter remedy likewise offers no justification for a denial of a constitutional right to be heard. The provisions in the act for judicial review was obviously violative of Florida constitutional provisions, since it sought to regulate the practice of courts of justice by a local, rather than a general law. (*Skinner* v. *City of Eustis*, 147 Fla. 22, 2 So. 2d 116, 135 A.L.R. 359*). While this question may be within the ambit of *Houston & T.P.R. Co.* v. *Texas*, 177 U.S. 66, and similar cases, we mention the point here solely to emphasize the extent to which substantial grounds were ignored by the court below in its determination to sustain the controverted liens.

More to the point is the fact that the right of review was required to be exercised within ten days from the date of the confirmation of the assessment roll, yet no provision was made for notifying affected persons as to the time when this act was done. Actually in the Hamilton case the assessment roll was confirmed—not on the return day of the newspaper notice—but several days later. Yet this fact, on which a right to judicial relief is claimed to depend, was never communicated to the property owners.

On the merits, the lower court's adherence to such sterile formalism becomes the less comprehensible when it is considered that actually the suits at bar were brought within 48 and 57 days after the abortive confirmation. To bar substantial rights because of the lapse of so small a time hardly comports with accepted notions of fairness and equity. This is especially so when the limitation it-

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*In this case the Court held that a limitation of six months in a City Charter was violative of Florida Const., Art. III, Sec. 20, prohibiting the passage of local laws regulating the practice of courts of justice.

self is so short (10 days) as almost to preclude the examination of the proceedings and the preparation of adequate pleadings.

In *Hayes* v. *Douglas County*, 92 Wis. 429, 65 N.W. 482, the headnote states:

> "A statute preventing a property owner from contesting the validity of an assessment for a public improvement after the expiration of forty days after proceedings therefor were commenced, based on constructive notice, is unconstitutional."

and in the opinion the court holds:

> "While it is, no doubt, convenient and desirable, on the part of the municipality, that all questions in respect to the validity of such proceedings shall be put at rest as soon as may be, still there is no such exigency as to justify even an apparently unfair abbreviation of the rights of property owners or undue advantage taken. The time allowed should be ample to afford a reasonable probability that he would become informed of the proceedings against his property, and be fairly able to assert his right, before it is finally barred. It is considered that, plainly, this statute does not afford such reasonable opportunity, and cannot be sustained as a valid limitation. A short statute of limitation, is not an allowable substitute for due process of law. It is utterly subversive of that constitutional protection to private rights of property. The fact that such short limitations have been sustained by some courts does not persuade the court that they are just and supportable on principle."

While offering no justification for the exercise of Federal jurisdiction in forbidden fields, it is not without significance that the amended complaint on which relief was accorded in the trial court affirmatively alleged that the complaining property owners had not pursued the statutory charter remedy for judicial review of the assessments.

This complaint was sustained in the Supreme Court of Florida against the City's motion to dismiss, and in the face of the contention that the property owners were estopped by the administrative proceedings. *City of Miami* v. *Hamilton*, Fla., 73 So. 2d 715. Thereafter that Court in reversing the decree based upon such complaint, not only ignored applicable and controlling decisions of this Court on Federal Constitutional questions, but ignored its own oft repeated statement that decisions rendered by it on prior appeals became the law of the case and were not subject to reexamination. In *Hamel* v. *Danko*, Fla., 82 So. 2d 321, the court said:

> "We said in Hunter v. Tyner, Supra (151 Fla. 707, 10 So. 2d 494), in reference to the review of an interlocutory order in an equity suit, and now reiterate, 'A writ of this kind being simply a method of procedure by which such appeals authorized by the statute can be brought to this court, its denial, we think, was an adjudication of the propriety of the order involved and it could not again be questioned in this appeal.' "

In the face of these pronouncements, the reasons for the majority opinion here sought to be reviewed exfoliate into conjecture.

CONCLUSION.

If the Charter had afforded adequate notice of the administrative proceedings as required by the Federal Constitution, the Circuit Court would have held, as it actually did, that the entire assessment as to Appellants' property was void, since no benefits were conferred by the resurfacing. This judgment would then have been affirmed by the Supreme Court of Florida under its invariable rule that decrees based upon factual determinations are not subject

to being over turned, except by the showing of clear error. In short, if the property owners had had any notice that the City Commission would hear their objections to the confirmation of the assessment roll, they would certainly have filed protests with the Commission. If the Commission had overruled the objections, the property owners would certainly have appealed. On appeal, the Court would have held the assessment void, as it did in the instant cases. Therefore, the only answer that the City can give to an unconscionable imposition of liens upon the Appellants' property is that they failed to respond to a newspaper notice and did not bring a suit in the Circuit Court within ten days after the confirmation of the assessment roll, which took place on a date about which they were not notified.

This statement accurately demonstrates that the opinion of the Supreme Court of Florida sustained statutory municipal action that completely ignored the Appellants' constitutional rights. The jurisdiction of this Court is plain and the appeal should be allowed.

We can think of no better characterization of the situation here complained about than a statement of the Supreme Court of California in *Spring Street Co.* v. *City of Los Angeles,* 170 Cal. 24. In this case, speaking of an assessment district, the Court quoted from an early Vermont case, as follows:

> "We have no doubt that a local assessment may so transcend the limits of equality and reason that its exaction would cease to be a tax, or contribution to a common burden, and become extortion and confisca-

tion. In that case it would be the duty of the court to protect the citizen from robbery under color of a better name. Allen v. Drew, 44 Vt. 174."

Respectfully submitted,

.....,

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APPENDIX

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APPENDIX "A".

IN THE SUPREME COURT OF FLORIDA

JANUARY TERM, A. D. 1957

EN BANC

THE CITY OF MIAMI, a Municipal Corporation in Dade County, Existing under the Laws of the State of Florida, Appellant, vs. NORTON R. GANGER and L. C. BETHART et al., Appellees.	Case No. 28,057.

Opinion filed January 30, 1957.

An Appeal from the Circuit Court for Dade County, Marshall C. Wiseheart, Judge.

J. W. Watson, Jr., City Attorney and Robert M. Haverfield, Assistant City Attorney, for Appellant.

Anderson & Nadeau and Clyde A. Epperson, for Appellees.

THOMAS, J.:

The appellant by resolution created a Highway Improvement District, published a notice that at a designated time "objections would be heard to the confirmation of such resolution," to quote from the decree, and subsequently improved a certain street described in the resolution and the notice by applying a one-half inch "leveler" course and a one inch surface course. The base of the

street and the curbs and gutters were not disturbed. In other words, the city resurfaced the existing street and undertook by the resolution to charge the cost, except for improving the intersections, to the abutting owners.

The judge decided that the notice was insufficient and that the appellant lacked the authority to impose the cost of an improvement of this nature upon the property owners. He appointed a master to ascertain what amounts had been paid by the various owners on the liens that had been filed to secure payment of the assessments, evidently with the view of later ordering the owners reimbursed.

We will detail the reasons for the rulings as we discuss the questions presented in the briefs.

The appellant claims that authority for the procedure was granted by Sec. 56 of the city charter, Chapter 10847, Laws of Florida, Special Acts of 1925, as amended. In that act we find that the city has the power to grade, pave, repave, macadamize and remacadamize streets and specially assess the cost against adjacent property. Improvements and the eventual assessments are initiated by resolution of the city commission defining the termini and routes and the character of the work proposed.

After adoption of the resolution, plans and specifications for the work showing the estimated cost are prepared by the manager and filed with the city clerk. When these are filed, the clerk is required to publish "once in a daily newspaper of general circulation" a notice that at a meeting of the commission "on a certain day and hour" objections of interested persons to the confirmation of the resolution will be heard. The notice must contain, though it may be in brief or general terms, the description and location of the improvement and a statement that plans, specifications and estimates have been filed.

So to generate the power vested by the statute, the resolution must be adopted, and to secure due process to those who must pay the cost, or whose property will be responsible for it, the notice defined in the law must be given.

The notice involved in the instant litigation follows: "All interested will take notice that at a meeting of the City Commission at 9:30 o'clock A. M. December 3rd, 1952, their objections will be heard to the confirmation of Resolution No. 25006, adopted November 19th, 1952, ordering paving improvements on South Miami Avenue, from S. W. 15th Street Road to 200′ more or less south of Alatka Street, designated improvement H-503.

"Plans, specifications and estimate of cost of said improvements are on file in the City Clerk's office.

F. L. Correll,
City Clerk."

November 22, 1952.

When we place side by side the relevant section of the charter and the notice we have fully quoted, it is plain to us that the latter contained all elements required by the statute. It was published once in a newspaper of general circulation, The Miami Herald; it carried the date and hour of the meeting of the city commission at which complaints would be entertained; it contained a brief general description of the location where the improvement would be made; and it included the statement that the plans, specifications and estimates had been filed with the clerk.

The appellees seem to have convinced the circuit court that there were five defects rendering the notice insufficient: (1) failure to mention the place, that is, the city, where the objections would be heard, (2) absence of the name of the city commission which would hear them, (3) omission of the name of the city where the streets lay; (4)

want of identity of the signatory; (5) insertion of the notice in the classified section of the Herald.

The law only requires that persons interested be notified that protests will be heard at a meeting of the commission, and that the day and hour the commission will meet for the purpose be shown. No mention is made about naming in the notice the place where the commission would hold the particular meeting.

It seems to us that an interpretation that a property owner who wished to object to the proceeding would not be sufficiently informed to be able to locate a meeting of the commission of the city of Miami would be far-fetched. We have the same view about the complaint that the commission that would hear the complaints was not named. In the description of the street appears the familiar title "South Miami Avenue," and the notice appeared in The Miami Herald. We apprehend that few citizens of this state and no owners of property in Miami at all, especially on Miami Avenue between S. W. 15th Street and the vicinity of Alatka Street, would be unaware that these titles pertain to that city. We conclude that anyone purchasing an edition of the Herald and reading the notice would be fully conscious of the nature, place and purpose of the meeting.

Our reaction to the next two so-called imperfections, lack of identity of the city and the signer of the notice, is the same for the same reasons.

As for the position in the paper, among the classified advertisements, we simply say that the publication is the test and that there is no requirement that the notice shall appear in any special section of the newspaper. Actually the notice did appear under the caption "CLASSIFIED INFORMATION" but immediately above it was the title

"LEGAL NOTICES." We think this position was quite appropriate.

"The purpose of notice under proceedings of this kind is to secure to the owner the opportunity to protect his property from the lien of the proposed tax * * * and, in order to be effectual, it should be so full and clear as to disclose to persons of ordinary intelligence *in a general way* what is proposed and when and where property owners may be heard." (Italics supplied). *Escott* v. *City of Miami*, 107 Fla. 273, 144 So. 397.

We consider that the notice substantially conformed to the statute and that any protestant was advised when he could appear and where he could get full information about the contemplated work inasmuch as the plans, specifications and estimates were shown to be on file in the clerk's office and to relate to a certain numbered resolution dealing with improvement of a stated street.

On the matter of the validity of the notice we must disagree with the chancellor, and by disagreeing, we cannot adopt the view that the property owners could ignore the notice and at this late date successfully attack the action of the city, on the ground that due process had not been afforded them.

The chancellor thought that "*resurfacing* was necessary to keep the street in repair and facilitate the flow of traffic" and that the "work was for the benefit of the general public, and the abutting owners received no special benefit."

We can understand the potency of an argument that once a street is paved the cost of maintaining it should be borne by the public. Although we cannot agree that keeping a street in good repair is of no special benefit whatever to the property it bounds, we think that the power to maintain and assess the cost to adjacent property must

be found in the charter, and in our search we have not discovered that the municipality was granted the power to "resurface" and assess the costs as in the case of original or new construction. There is no doubt that the city could grade, pave and macadamize and it is clear from the use of the prefix "re" that grading, paving and macadamizing could be done again or anew and liens placed on the property to cover the cost. Presumably a street could so deteriorate that it would be necessary to repeat the work that had made it a graded, paved or macadamized way for the use of vehicles. But we agree with the circuit judge that "surfacing" is not a synonym of the other gerunds used in the act. Definitions of the words "surface" and "surfacing" appearing in available dictionaries indicate that they describe a face or covering of a body as distinguished from the other dimensions. To surface, according to one authority, is to make smooth, or put a surface on, such as "surface a road." Thorndike-Barnhart dictionary. The total application consisted of a coating an inch and a half in thickness and when this work is considered with the nature of a street, it seems to us that the circuit judge was not illogical in his holding that the layers were to make smoother a street worn by traffic, and that the improvement was in effect maintenance as distinguished from construction or reconstruction.

In conclusion we state that the word "resurfaced" was not the choice of the circuit judge. The relevant part of the resolution was that a certain street be "resurfaced * * * with approximately ½" leveling course and 1" surface course of asphaltic concrete * * *." To do the work was within the power of the city; to assess it against abutting property was without such power.

The city had no inherent right to levy special assessments; such power could have been invested in it only by

the legislature. *City of Coral Gables* v. *Coral Gables, Inc.*, 119 Fla. 30, 160 So. 476. The power to assess for what was obviously repairs was lacking. The assessments were, therefore, void. The payment of assessments by some of the owners would not operate as an estoppel because that doctrine is inapplicable when an assessment is void. *Gulf View Apartments, Inc., et al.* v. *City of Venice*, 108 Fla. 41, 145 So. 842. The appellees were entitled to the relief they sought and were granted.

Affirmed.

TERRELL, C. J., and ROBERTS, J., concur

THORNAL, J., concurs specially

HOBSON, DREW and O'CONNELL, JJ., dissent

THORNAL, J., Concurring Specially:

I concur in the judgment of affirmance. I agree with all of the opinion of Mr. Justice Thomas save that portion which in effect holds that the City Charter did not authorize the levy of an assessment for special benefits to particular property which might result from the "re-surfacing" of a street. In my view, authority to assess the cost of "re-macadamizing" a street is tantamount to authority to assess for "re-surfacing" a street. However, in order to justify the assessment the improvement must redound to the special benefit of the property that is being assessed. *Utley* v. *City of St. Petersburg*, 107 Fla. 6, 144 So. 58; *Fisher* v. *Board of County Commissioners of Dade County*, (Fla. 1956), 84 So. 2d 572.

Here the trial judge specifically found that "the work was for the benefit of the general public, and the abutting owners received no special benefit". The record abounds in evidence more than adequate to sustain this conclusion.

For the foregoing reasons and the reasons announced by Mr. Justice Thomas on the other points, I would affirm the decree.

DREW, J., dissenting in part:

I agree with that portion of the opinion of Mr. Justice Thomas holding that the original notice of the City of Miami of its intention to construct and install the improvements which are the subject matter of this litigation was valid and effectual but I must respectfully dissent from the affirmance of the decree appealed from which holds these assessments to be invalid and void. I am impelled to this conclusion for two basic and fundamental reasons.

It is stated in the opinion of Mr. Justice Thomas "Although we cannot agree that keeping a street in good repair is of no special benefit whatever to the property it bounds, we think that the power to maintain and assess the cost to adjacent property must be found in the charter, and in our search *we have not discovered that the municipality was granted the power to 're-surface' and assess the costs* as in the case of original or new construction." I cannot agree with this statement. Section 56 of the city charter authorizes special assessments for highway improvements which the act says embraces "the grading, paving, *repaving*, macadamizing and *remacadamizing* of highways * * *." I don't see how the Legislature could have more clearly vested the power in the city to do the very work covered by the resolution and to make such assessments therefor against the abutting property in proportion to the benefit it receives. I think it is pertinent to note that the opinion of Mr. Justice Thomas concedes that such work was beneficial to the abutting property. The results reached turn squarely on the proposition, as I view it, that the city lacked authority to do the work which afforded the basis of the special assessment.

The words "macadamizing" and "remacadamizing" embrace the identical subject as "surfacing" or "resurfacing." "Macadamizing" a road merely contemplates or embraces a layer or surface over the rock, stone or cement which constitutes the road itself. "Macadamizing" is sometimes referred to as "slag" but may be any substance covering the top or surface of the road put there for smoothness or safety. Webster's Collegiate Dictionary, Fifth Edition, describes "macadamize" as "to construct or finish a road by packing a layer of small broken stone on a convex well-drained earth roadbed." "Macadam", according to the foregoing authority, is the "broken stone used in macadamizing." In 54 C.J.S. 890, "macadamize" is described as follows: "While it has been observed that the meaning of the word 'macadamize' is susceptible of variation, according to the particular relation in which it is employed, it is said to have a fixed and definite meaning. It has been defined as meaning to cover a road or path with small broken stones, which uniting by pressure form a smooth hard surface; to cover, as a road, way, or path, with small stones, so as to form a smooth laid surface; to cover as a roadway surface; to cover a street or road by the process introduced by Macadam, which consists of the use of small stones, of a uniform size, consolidated and leveled by heavy rollers. The term may refer not only to the kind of material to be used in covering a street or road, but also the manner in which it is to be laid."

Moreover, the pertinent portion of Section 56 of the city charter clearly and unequivocally authorizes special assessments not only for grading, paving, macadamizing of highways in the beginning but also authorizes a special assessment where it is necessary to repave or remacadamize. I don't see how the act could be any clearer with reference to this subject nor how one would go about the preparation of such a provision for inclusion in a city charter which

would make it any clearer than that contained in Section 56.

Nor can the words of Section 56, viz. "pave and repave" be ignored. In essence these words mean to produce or reproduce a smooth surface so that "repave" and "resurface" would be indistinguishable within the intent and clear language of the act. See 76 C.J.S., p. 1175, especially test to note 30 and 54 C.J. 401. Cf. *McDonald* v. *Fraleigh*, 86 Fla. 577, 98 So. 830 (1923).

Another basic and fundamental reason why I cannot agree to the result reached by the trial court and approved by the foregoing opinion which holds these assessments to be void is the failure of the appellees to act promptly in the matter.

Holding as we do that the original notice of the intention of the City of Miami to install these improvements and assess a portion of the cost against the abutting property was valid in all respects, the failure of the appellees to promptly assert their rights in the premises now estops them from maintaining an action, the ultimate objective of which is to declare the assessments invalid. It was the duty of the appellees to promptly assert their position when the City obtained jurisdiction of the improvement by virtue of the passage of the initial resolution and the giving of what we hold to be a valid and legal notice.

While all of the decisions of this Court may not be completely reconciled on this question, our latest expression in the case of *Rosche* v. *City of Hollywood*, 55 So. 2d 909 (Fla. 1952), clearly answers this contention adversely to the contention of appellees. In that case we made the following unequivocal holding:

> " 'The defendant city also contends that plaintiffs are estopped to maintain this action for the cancella-

tion of the special assessments for the improvements on these streets. This point, in my opinion, is well taken. Plaintiffs had direct notice of the ordinances providing for street improvements; they saw the pavement being put down and were well aware that part, or all of the cost thereof, would have probably been assessed against their properties. They stood idly by when they could have filed their protests with the City Commission, or could have resorted to a Court of Equity to restrain the paving of the streets, and the levying of the assessments thereon. They remained silent for two years after the City became liable for the cost of the paving of the streets and did nothing. Having failed to avail themselves of any of the remedies provided for their protection under the laws of Florida, and not having shown fraud or bad faith on the part of the City Commissioners in making the assessments, they should now be held to be estopped to do so. It, therefore, follows that the exceptions to the Special Master's report should be sustained and the bill of complaint dismissed.' "

Any other conclusion would be disastrous to the fiscal affairs of the city and could well result in municipal bankruptcy.

It is stated in the foregoing opinion of Mr. Justice Thomas: "The payment of assessments by some of the owners would not operate as an estoppel because that doctrine is inapplicable when an assessment is void." As authority for that statement the case of *Gulf View Apartments, Inc., et al.* v. *City of Venice*, 108 Fla. 41, 145 So. 842 is cited. In the cited case, however, the property owner waited nearly two years after the assessment was made to institute a suit to set it aside and the court there held, as it did in *Rosche* v. *City of Hollywood*, *supra*, that under the circumstances shown by the record in that case and because objections were not seasonably filed, the owner was estopped to question the validity of the assessment.

The property owner in that case had never paid any portion of the assessment and the only reference in the opinion concerning estoppel in instances where the assessment is wholly void is the gratuitous statement "We are conscious of the rule to the effect that the doctrine of estoppel has no application where an assessment is void." In the companion case of *City of Miami* v. *Hamilton, et al.*, now also under consideration by us, it appears that some of the property owners have paid either all or a portion of these assessments and the court in its decree has retained jurisdiction with reference to these payments, obviously for the purpose of later providing for their repayment by the city to the property owners. It is extremely doubtful even in the case of a void assessment whether the property owner may recover such assessment even though he may not be estopped from denying his liability for the balance. McQuillin on Municipal Corporations, (3rd Ed.), Vol. 14, Sec. 38.194.

I, therefore, respectfully dissent and would reverse the decree appealed from.

IN THE SUPREME COURT OF FLORIDA

JANUARY TERM, A. D. 1957

EN BANC

THE CITY OF MIAMI, a Municipal Corporation in Dade County, Existing under the Laws of the State of Florida,
Appellant,

vs.

THOMAS H. HAMILTON et als.,
Appellees.

Case No. 28,058.

Opinion filed January 30, 1957.

An Appeal from the Circuit Court for Dade County, Marshall C. Wiseheart, Judge.

J. W. Watson, Jr., City Attorney and Robert M. Haverfield, Assistant City Attorney for Appellant.

Anderson & Nadeau, for Appellees.

PER CURIAM.

Affirmed on authority of *The City of Miami* v. *Norton R. Ganger and L. C. Bethart et al.*, filed this date.

TERRELL, C. J., THOMAS, ROBERTS and THORNAL, JJ., concur.

HOBSON, DREW and O'CONNELL, JJ., dissent.

DREW, J., dissenting:

I respectfully dissent for the reasons stated in *City of Miami* v. *Norton R. Ganger and L. C. Bethart et al.*, opinion filed this date.

IN THE SUPREME COURT OF FLORDIA

JULY TERM A. D. 1957

THE CITY OF MIAMI, a Municipal Corporation in Dade County, Existing under the Laws of the State of Florida,
Appellant,

vs.

NORTON R. GANGER and L. C. BETHART et al.,
Appellees.

Case No. 28,057.

Opinion filed October 11, 1957.

An Appeal from the Circuit Court for Dade County, Marshall C. Wiseheart, Judge.

J. W. Watson, Jr., City Attorney and Robert M. Haverfield, Assistant City Attorney for Appellant.

Anderson & Nadeau and Clyde A. Epperson, for Appellees.

On Rehearing Granted.

DREW, J.

The answer to the question of whether the City had the power to repair the streets in the manner described in the opinion by Mr. Justice Thomas and to assess a portion of the cost thereof against the abutting property owners is found in the clear and unequivocal language of Section 56 of the city charter.[1] This legislative act provides "A local

[1]Ch. 10847, Special Acts of 1925.

improvement is an improvement defined by this section and made under the provisions hereof." It further describes the classes of improvements "authorized to be made under the provisions of this act." There are five classes of improvements so designated but for the purpose of this discussion, we need concern ourselves directly only with class one. The following is the exact language of the city charter describing an authorized improvement under the act for which special assessments benefits may be made.

> "CLASS 1. High improvements embrace the grading, paving, *re-paving*, macadamizing and *re-macadamizing* of highways, with necessary drainage, sewer inlets, manhole and catch basins and, if the Commission so orders, may embrace curbs and gutters." (Emphasis supplied).

There are many significant words in this quotation. The first word is "improvement". This clearly symbolizes making better something which already exists. Webster, among other things, defines "improvement" as "betterment" and "state of being improved". The language of the act provides not merely for grading, paving and macadamizing a street but also uses the words "re-paving" and "re-macadamizing". This is a clear legislative grant of power to do exactly what was done in the instant case. It is difficult to understand what words the Legislature could have used which would more clearly have vested the power in the City to do the work covered by the resolution and make assessments therefor against the abutting property. The words "macadamizing" and "re-macadamizing" embrace the identical subject as "surfacing" or "re-surfacing". "Macadamizing" a road merely contemplates or embraces a layer or surface over the rock, stone or cement which constitutes the road itself. "Macadamizing" is sometimes referred to as "slag" but may be any substance covering the

top or surface of the road put there for smoothness or safety. Webster's Collegiate Dictionary, Fifth Edition, describes "macadamize" as "to construct or finish a road by packing a layer of small broken stone on a convex well-drained earth roadbed." "Macadam", according to the foregoing authority, is the "broken stone used in macadamizing." In 54 C.J.S. 890, "macadamize" is described as follows: "While it has been observed that the meaning of the word 'macadamize' is susceptible of variation, according to the particular relation in which it is employed, it is said to have a fixed and definite meaning. It has been defined as meaning to cover a road or path with small broken stones, which uniting by pressure form a smooth hard surface; to cover, as a road, way or path, with small stones, so as to form a smooth laid surface; to cover as a roadway surface; to cover a street or road by the process introduced by MacAdam, which consists of the use of small stones, of a uniform size, consolidated and leveled by heavy rollers. The term may refer not only to the kind of material to be used in covering a street or road, but also the manner in which it is to be laid." Moreover the words used in the quoted section of the city charter "pave and re-pave" are of significance to this discussion. In essence these words mean to produce or re-produce smooth surface so that "re-pave" and "re-surface" would be indistinguishable within the intent and clear language of the act. See 76 C.J.S., p. 1175, especially text to note 30 and 54 C.J. 401. *C. F. McDonald* v. *Fraleigh*, 86 Fla. 577, 98 So. 830 (1923). It may not appeal to some to allow a city to assess for the cost of re-paving or re-surfacing a street but it is unquestionably within the power of the Legislature to authorize such to be done. We reiterate that such power could hardly have been vested in language of clearer import and meaning than that contained in the city charter.

Holding then, as we unanimously do, that the notice discussed in the opinion by Mr. Justice Thomas was in all respects regular and in full compliance with the provision of the city charter relating to special assessments for benefits, we now direct our attention to the requirements placed by the law upon the property owner if he desires to contest the regularity of the proceedings, the power of the city to make the assessments or the amount of the assessments determined to be chargeable against the respective parcels of land.[2]

This is not the first time this section 56 of the city charter has been before this Court; nor is it the first time we have had occasion to deal with the duty and responsibility of the property owner to promptly object to the city commission if he has a grievance with reference to a proposed improvement. In *Escott* v. *City of Miami*, 144 So. 397 (Fla. 1932), in speaking of this identical section of the city char-

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[2]The resolution authorizing the work and establishing the highway improvement tax district was adopted November 19, 1952. This suit in equity was commenced April 1, 1954.

The resolution was approved by the City Commission after a hearing on December 3, 1952, at which no objections were offered.

Bids were advertised for, contracts awarded and the improvements completed. The Clerk published notice prior to a hearing on June 3, 1953, where no objections were made to the improvements, and they were then accepted.

After a preliminary tax roll had been prepared, the clerk published notice of a hearing on February 3, 1954, for objections to confirmation of the roll. At the hearing, where there were no objections, the City Commission confirmed the assessments, finding: "That the sums and amounts assessed against each of the lots or parcels of ground in said preliminary rolls are less than the amount that each of the said lots or parcels of ground is especially benefited by said improvement and that such amounts are in proportion to the special benefits that the property received * * *."

ter, after holding the original notice to have been validly given, we said:

> "If the property owner had notice, and in this case we have held that he did have, his *only* method of questioning any error or irregularity in the proceedings was by filing objections before the city commission, and, if overruled there, by filing his special appeal to the circuit court, in the manner provided by the charter.
>
> "Where a property owner has an opportunity given him, under a statute providing for special assessments for local improvements, to appear and contest the question before the local authorities whose duty it is to pass upon objections, *their determination on the subject of benefits is final, and, if he fails to avail himself of the opportunity provided by the statute, he thereby admits the finality of the determination, and is estopped to raise the question in subsequent proceedings, such as by suit in equity to enjoin the enforcement of assessments which have become conclusive under the statute.*" (Emphasis supplied).

See also *Rosche* v. *City of Hollywood*, 55 So. 2d 909 (Fla. 1952), and *Summerland, Inc.*, v. *City of Punta Gorda*, 134 So. 611 (Fla. 1931).

Section 56 of the charter of the City of Miami provides in detail the steps to be taken by the City officials in authorizing public improvements, the costs of which are to be paid in whole or in part by the owners of the land abutting said improvements and especially benefited thereby. The various notices required to be published are for the purpose of advising the property owners affected of the nature and extent of the improvements, the extent of the assessments to be made against the land to be especially benefited thereby and the details of such construction so that the affected property owners may be fully advised as to what is con-

templated, the approximate cost of the improvement and the approximate amount to be ultimately assessed against the affected property. These requirements of the charter serve not only to protect the property owner by giving him notice of contemplated improvements so that he may take timely action either before the city commission or in the courts to protect his interest in the matter but it serves also to afford the municipal government the opportunity of financing such improvements and a means of setting in repose questions of the validity of such proceedings and the assessments to be made pursuant thereto. Such proceedings serve much the same purpose as validation proceedings under Chapter 75, F. S. A. Both are necessary to the efficient and orderly financing of civic improvements and are a necessary adjunct of fiscal management. It would be disastrous to the fiscal affairs of the City and detrimental to the general welfare of its citizens if the validity of such assessments was constantly open to question. The orderly administration of the affairs of the city require that the property owner make timely objection and it imposes no undue burden on him to do so. We specifically pointed out in *Summerland, Inc.*, v. *City of Punta Gorda, supra*, that a property owner who stands by and permits a public improvement to be made to the benefit of his property under authority of a tribunal vested with the power to levy such assessment may be estopped from raising objections thereto by sleeping on his rights and not promptly asserting them even though had they been timely raised, such objections might have rendered the assessment invalid. The failure of the property owners here to promptly assert whatever rights they had or make any effort to comply with the applicable provisions of the city charter now estops them from questioning the validity or amount of these assessments.

I am authorized to say that Mr. Justice Hobson, Mr. Justice Thornal and Mr. Justice O'Connell concur in these views.

The judgment appealed from is reversed with directions to dismiss the complaint.

HOBSON, THORNAL and O'CONNELL, JJ., Concur

TERRELL, C. J., THOMAS and ROBERTS, JJ., Dissent

IN THE SUPREME COURT OF FLORIDA

JULY TERM, A. D. 1957

THE CITY OF MIAMI, a Municipal Corporation in Dade County, Existing under the Laws of the State of Florida,
Appellant,

vs.

NORTON R. GANGER and L. C. BETHART et al.,
Appellees.

THOMAS, J., Dissenting

The appellant by resolution created a Highway Improvement District, published a notice that a designated time "objections would be heard to the confirmation of such resolution," to quote from the decree, and subsequently improved a certain street described in the resolution and the notice by applying a one-half inch "leveler" course and a one inch surface course. The base of the street and the curbs and gutters were not disturbed. In other words, the city resurfaced the existing street and undertook by the resolution to charge the cost, except for improving the intersections, to the abutting owners.

The judge decided that the notice was insufficient and that the appellant lacked the authority to impose the cost of an improvement of this nature upon the property owners. He appointed a master to ascertain what amounts had been paid by the various owners on the liens that had been filed to secure payment of the assessments, evidently with the view of later ordering the owners reimbursed.

We will detail the reasons for the rulings as we discuss the questions presented in the briefs.

The appellant claims that authority for the procedure was granted by Sec. 56 of the city charter, Chapter 10847, Laws of Florida, Special Acts of 1925, as amended. In that act we find that the city has the power to grade, pave, repave, macadamize and re-macadamize streets and specially assess the cost against adjacent property. Improvements and the eventual assessments are initiated by resolution of the city commission defining the termini and routes and the character of the work proposed.

After adoption of the resolution, plans and specifications for the work showing the estimated cost are prepared by the manager and filed with the city clerk. When these are filed, the clerk is required to publish "once in a daily newspaper of general circulation" a notice that at a meeting of the commission "on a certain day and hour" objections of interested persons to the confirmation of the resolution will be heard. The notice must contain, though it may be in brief or general terms, the description and location of the improvement and a statement that plans, specifications and estimates have been filed.

So to generate the power vested by the statute, the resolution must be adopted, and to secure due process to those who must pay the cost, or whose property will be responsible for it, the notice defined in the law must be given.

The notice involved in the instant litigation follows: "All interested will take notice that at a meeting of the City Commission at 9:30 o'clock A. M. December 3rd, 1952, their objections will be heard to the confirmation of Resolution No. 25006, adopted November 19th, 1952, ordering paving improvements on South Miami Avenue, from S. W.

15th Street Road to 200' more or less south of Alatka Street, designated improvement H-503.

"Plans, specifications and estimate of cost of said improvements are on file in the City Clerk's office.

November 22, 1952.

F. L. Correll,
City Clerk."

When we place side by side the relevant section of the charter and the notice we have fully quoted, it is plain to us that the latter contained all elements required by the statute. It was published once in a newspaper of general circulation, The Miami Herald; it carried the date and hour of the meeting of the city commission at which complaints would be entertained; it contained a brief general description of the location where the improvement would be made; and it included the statement that the plans, specifications and estimates had been filed with the clerk.

The appellees seem to have convinced the circuit court that there were five defects rendering the notice insufficient: (1) failure to mention the place, that is, the city, where the objections would be heard, (2) absence of the name of the city commission which would hear the, (3) omission of the name of the city where the streets lay; (4) want of identity of the signatory; (5) insertion of the notice in the classified section of the Herald.

The law only requires that persons interested be notified that protests will be heard at a meeting of the commission, and that the day and hour the commission will meet for the purpose be shown. No mention is made about naming in the notice the place where the commission would hold the particular meeting.

It seems to us that an interpretation that a property owner who wished to object to the proceeding would not

be sufficiently informed to be able to locate a meeting of the commission of the city of Miami would be far-fetched. We have the same view about the complaint that the commission that would hear the complaints was not named. In the description of the street appears the familiar title "South Miami Avenue," and the notice appeared in The Miami Herald. We apprehend that few citizens of this state and no owners of property in Miami at all, especially on Miami Avenue between S. W. 15th Street and the vicinity of Alatka Street, would be unaware that these titles pertain to that city. We conclude that anyone purchasing an edition of the Herald and reading the notice would be fully conscious of the nature, place and purpose of the meeting.

Our reaction to the next two so-called imperfections, lack of identity of the city and the signer of the notice, is the same for the same reasons.

As for the position in the paper, among the classified advertisements, we simply say that the publication is the test and that there is no requirement that the notice shall appear in any special section of the newspaper. Actually the notice did appear under the caption "CLASSIFIED INFORMATION" but immediately above it was the title "LEGAL NOTICES." We think this position was quite appropriate.

"The purpose of notice under proceedings of this kind is to secure to the owner the opportunity to protect his property from lien of the proposed tax * * * and, in order to be effectual, it should be so full and clear as to disclose to persons of ordinary intelligence *in a general way* what is proposed and when and where property owners may be heard." (Italics supplied). *Escott* v. *City of Miami*, 107 Fla. 273, 144 So. 397.

We consider that the notice substantially conformed to the statute and that any protestant was advised when he could appear and where he could get full information about the contemplated work inasmuch as the plans, specifications and estimates were shown to be on file in the clerk's office and to relate to a certain numbered resolution dealing with improvement of a stated street.

All members of the court agree to the preceding opinion with reference to the sufficiency of the notice but the opinion which follows is that only of Terrell, C. J., Roberts, J., and the writer. Although we three cannot adopt the view that the property owners could ignore the notice and at this late date successfully attack the action of the city, on the ground that due process had not been afforded them, we believe that the property owners can assail the liens on the ground that the city did not have the power to create them under the circumstances.

The chancellor thought that "*resurfacing* was necessary to keep the street in repair and faciliate the flow of traffic" and that the "work was for the benefit of the general public, and the abutting owners received no special benefit."

We can understand the potency of an argument that once a street is paved the cost of maintaining it should be borne by the public. Although we cannot agree that keeping a street in good repair is of no special benefit whatever to the property it bounds, we think that the power to maintain and assess the cost to adjacent property must be found in the charter, and in our search we have not discovered that the municipality was granted the power to "re-surface" and assess the costs as in the case of original or new construction. There is no doubt that the city could grade, pave and macadamize and it is clear from the use

of the prefix "re" that grading, paving and macadamizing could be done again or anew and liens placed on the property to cover the cost. Presumably a street could so deteriorate that it would be necessary to repeat the work that had made it a graded, paved or macadamized way for the use of vehicles. But we agree with the circuit judge that "surfacing" is not a synonym of the other gerunds used in the act. Definitions of the words "surface" and "surfacing" appearing in available dictionaries indicate that they describe a face or covering of a body as distinguished from the other dimensions. To surface, according to one authority, is to make smooth, or put a surface on, such as "surface a road." Thorndike-Bernhart dictionary. The total application consisted of a coating an inch and a half in thickness and when this work is considered with the nature of a street, it seems to us that the circuit judge was not illogical in his holding, based on the testimony of experts, that the layers were to make smoother a street worn by traffic, and that the improvement was in effect maintenance as distinguished from construction or reconstruction.

In conclusion we state that the word "resurfaced" was not the choice of the circuit judge. The relevant part of the resolution was that a certain street be "resurfaced * * * with approximately 1/2" leveling course and 1" surface course of asphaltic concrete * * *." To do the work was within the power of the city; to assess it against abutting property was without such power.

The city had no inherent right to levy special assessments; such power could have been invested in it only by the legislature. *City of Coral Gables* v. *Coral Gables, Inc.*, 119 Fla. 30, 160 So. 476. The power to assess for what was obviously repairs was lacking. The assessments were, therefore, void. The payment of assessments by some of

the owners would not operate as an estoppel because that doctrine is inapplicable when an assessment is void. *Gulf View Apartments, Inc., et al.* v. *City of Venice*, 108 Fla. 41, 145 So. 842. We three are convinced that appellees were entitled to the relief they sought and were granted.

Therefore we dissent.

TERRELL, C. J., and ROBERTS, J., CONCUR.

IN THE SUPREME COURT OF FLORIDA

JULY TERM, A. D. 1957

THE CITY OF MIAMI, a Municipal Corporation in Dade County, Existing under the Laws of the State of Florida,
Appellant,

vs.

THOMAS R. HAMILTON et als.,
Appellees.

Case No. 28,058.

Opinion filed October 11, 1957.

An Appeal from the Circuit Court for Dade County, Marshall C. Wiseheart, Judge.

J. W. Watson, Jr., City Attorney and Robert M. Haverfield, Assistant City Attorney, for Appellant.

Anderson & Nadeau, for Appellees.

PER CURIAM.

Reversed on the authority of City of Miami v. Ganger, opinion filed this date.

TERRELL, C.J., THOMAS, HOBSON, ROBERTS, DREW, THORNAL and O'CONNELL, JJ., concur.

APPENDIX "B".

Miami City Code, Section 56. Assessment of Individual Lots:

"(L) *Notice of hearing after filing preliminary assessment roll.* Upon the filing with the city clerk of the preliminary assessment roll required by this section, the city clerk shall publish once in each of two successive weeks in a daily newspaper of general circulation published in the city, a notice stating that at a regular meeting of the commission held on a certain day and hour, not less than twelve days from the date of the first publication, all interested persons may appear and file written objections to the confirmation of said roll.

"(M) *Hearing objections and actions thereon.* At the time and place stated in such notice the commission shall meet and receive the objections in writing of all interested persons as stated in said notice. Then or thereafter, the commission shall either annul or sustain or modify in whole or in part the *prima facie* assessment as indicated on said roll, either by confirming the *prima facie* assessment against any or all lots or parcels described therein, or by cancelling, increasing or reducing the same, according to the special benefits which said commission decides each of said lot or parcel has received, or will receive on account of such improvement. If any property which may be chargeable under this section shall have been omitted from said preliminary roll or if the *prima facie* assessment has not been made against it, the commission may place on said roll an apportionment to said property. The commission may thereupon confirm said roll, but shall not confirm any assessment in excess of the

special benefits to the property assessed, and the assessments so confirmed shall be in proportion to the special benefits. Forthwith after such confirmation said assessment roll shall be delivered to the director of finance, and such confirmation shall be final and conclusive except as hereinafter provided.

"(N) *Appeal to court.*—If the owners of any railroad, or any lot or parcel of land so assessed shall within ten days from such confirmation, file a written verified petition in the office of the clerk of the circuit court of Dade County, setting forth that the amount so assessed against any property of the petitioner exceeds the amount of the special benefit the petitioner has sustained or will sustain by reason of such improvement, or is out of proportion to benefits, or that the assessment is valid, for any reason whatsoever, and shall at the same time file with said clerk a written undertaking in at least the sum of two hundred dollars ($200.00), with a good and sufficient surety to be justified before and approved by the said clerk, to the effect that the petitioner will pay to said city all costs and damages to be sustained by it by reason of such proceeding, and shall, within ten (10) days from such conformation, deliver (to) the city manager or leave in his office a copy of said petition, then the validity of such assessment against said property shall be determined as hereinafter provided. Within ten (10) days after the delivery of said copy of petition then the validity of such assessment against said property shall be determined as hereinafter provided. Within ten (10) days after the delivery of said copy of petition to the city manager or, at his office, the city manager shall appear and answer the said petition, and the case shall be heard upon such petition and answer and upon such evidence as may be presented to the court. The judge of the court shall hear and

determine the cause, in term or vacation, giving such hearing and determination precedence over all other cases so far as the same may be practicable.

"The decision of the court in such proceedings shall be final and an appeal shall be allowed only if properly prayed and perfected ten (10) days from the date of the order; if the assessment against such property shall be sustained or reduced or abated by the court, the director of finance shall note that fact on the assessment roll opposite the description of the property whose assessment was so contested; the cost of any such proceedings shall be paid by the party complaining of such assessment, unless the said assessment is abated or is reduced by the court ten per cent (10%) or more, and judgment shall be rendered against him for the amount of such cost; in case such assessment shall be abated or shall be reduced ten per cent (10%) or more, such costs and expenses shall be paid by the city and judgment shall be entered against it for the amount thereof.

"(O) *Amount of assessment set aside by court may be charged to city or new assessment roll may be prepared.* The amount of the special assessment against any lot or parcel which may be set aside by the court, unless the assessment upon the entire district be set aside, or the amount by which such assessment is so reduced, may by resolution of the commission be made chargeable against the city at large, or, in the discretion of the commission a new assessment roll may be prepared and confirmed in the manner hereinbefore provided for the preparation and confirmation of the original assessment roll, except that no notice of hearing upon such roll need be published or given as to any property unless the assessment against it is increased. The commission shall take prompt action as herein provided in case of the reduction or invalidation of

any assessment, and any such action shall be noted by the director of finance on said assessment roll, unless a new roll shall be made and confirmed, in which case the former roll shall be a nullity and the right of petition to the circuit court as to the amounts apportioned by the new roll shall be in force as to such new roll."